INDEX

AUTHORITIES CITED

Statutes: Page

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 79

WONG TAI, ALIAS WONG SUE JUN, ALIAS WONG WAI,
PLAINTIFF IN ERROR

v.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

This is a criminal case coming directly from the trial court, and no opinion was rendered therein.

JURISDICTION OF THIS COURT

The judgment of conviction sought to be reviewed was entered on February 26, 1925. (R. 12.)

The petition for writ of error was filed February 28, 1925. (R. 53.) The jurisdiction of this Court is invoked under Section 238 of the Judicial Code

as amended by the Act of January 28, 1915 (c. 22, 38 Stat. 803, 804), on the ground that constitutional questions are involved. One question raised first in this Court in the assignments of error (R. 55) is that the Act of February 9, 1909, and its amendments regulating importation of opium is unconstitutional. That point was not raised below and forms no basis for the jurisdiction of this Court. In addition, it is frivolous.

The other constitutional question, which was properly raised in the trial court by demurrer (R. 4–6) and motion in arrest (R. 52) and decided against the plaintiff in error (R. 15, 52), is that the indictment did not inform defendant of the nature or cause of the accusation, as required by the Sixth Amendment. This point is without substance. Both are discussed later in this brief.

STATEMENT

Plaintiff in error was convicted in the United States District Court for the Northern District of California under an indictment charging him and others with conspiring to violate the Act of February 9, 1909 (c. 100, 35 Stat. 614), as amended by the Acts of January 17, 1914 (c. 9, 38 Stat. 275), and May 26, 1922 (c. 202, 42 Stat. 596). The indictment charges plaintiff in error and his codefendants with conspiring to "receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to wit,

smoking opium," well knowing the said drugs to have been unlawfully imported. (R. 2.)

By demurrer and motion in arrest of judgment, plaintiff in error attacked the sufficiency of the indictment, alleging that it did not sufficiently apprise him of "the nature or the cause of the accusation" against him, thus seeking to raise a constitutional question. The demurrer and motion in arrest were overruled. (R. 6 and 52.)

The plaintiff in error also filed a motion for a bill of particulars, which was denied. (R. 7–9.)

APPLICABLE STATUTES

Section 37 of the Criminal Code of the United States reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

The Act of January 17, 1914 (c. 9, 38 Stat. 275), amended the entire Act of February 9, 1909 (c. 100, 35 Stat. 614). The Act of May 26, 1922 (c. 202, 42 Stat. 596), amended all but Sections 3, 4, and 7 of the Act of February 9, 1909, as amended.

Paragraphs "a," "b," "c," and "f" of Section 2 of the Act of February 9, 1909, as amended by Section 1 of the Act of May 26, 1922, read as follows:

(a) That there is hereby established a board to be known as the "Federal Narcotics Control Board" and to be composed of the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce Except as otherwise provided in this Act or by other law, the administration of this Act is vested in the Department of the Treasury.

(b) That it is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.

> (f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

Section 3 of the Act of February 9, 1909, as amended by the Act of January 17, 1914, reads as follows:

> That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.

CONTENTIONS OF THE PLAINTIFF IN ERROR

Plaintiff in error in his brief urges three grounds for reversal of the judgment below:

I. That the Act of February 9, 1909, as amended by the Act of May 26, 1922, is unconstitutional.

II. That the indictment did not inform him of the nature and cause of the accusation, as required by the Sixth Amendment, and the trial court erred in overruling his demurrer and denying his motion for a bill of particulars.

III. That the trial court erred in instructing the jury that "any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported."

SUMMARY OF ARGUMENT

I. The record fails to show that plaintiff in error raised in the trial court any question regarding the constitutionality of the Act of February 9, 1909, as amended by the Act of May 26, 1922. Therefore no such question can now be utilized to support the jurisdiction of this Court. If any such question were open, the Act of February 9, 1909, is valid. This Court long ago held that Congress has authority to prohibit absolutely the importation of opium. Cases dealing with the Harrison Narcotic Act have no bearing upon the constitutionality of the Act of February 9, 1909, as amended, as the latter is based on the power to regulate commerce. The provision of the Act of February 9, 1909, as amended, permitting the importation of such amounts of opium as the Federal Narcotics Control Board finds necessary for medical and legitimate uses is not a delegation of legislative power. There is no conflict between the Act under which the case at bar arises, dealing with importing narcotic drugs, and the Act of January 17, 1914 (c. 10, 38 Stat. 277), dealing with the manufacture of smoking opium in this country, and if there were such conflict plaintiff in error could derive no advantage therefrom because he is asserting no rights under the Act of 1914.

II. The indictment fairly meets the constitutional requirements. It plainly sets forth all the statutory ingredients of the offense charged and it does not appear that the alleged lack of allega-

tions of detailed facts therein in any way prejudiced the plaintiff in error.

III. The presumption created by the statute, arising from unexplained possession of opium, was held valid in *Yee Hem* v. *United States,* 268 U. S. 178, and in the absence of any attempt on the part of plaintiff in error to show that he was lawfully in possession of opium, the instruction of the trial court that "any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported" was in substance a statement of the statutory presumption.

ARGUMENT

I

NO QUESTION AS TO THE CONSTITUTIONALITY OF THE ACT OF FEBRUARY 9, 1909, AS AMENDED, IS OPEN ON THE RECORD NOW BEFORE THIS COURT, BUT IF ANY SUCH QUESTION WERE OPEN THE ACT AS AMENDED IS VALID

The record fails to show that plaintiff in error raised at the trial any question regarding the constitutionality of the Act of February 9, 1909, as amended by the Act of May 26, 1922, *supra.* The point is first mentioned in the assignments of error in this Court. It is therefore apparent that no such question can now be utilized to support the jurisdiction of this Court under Section 238 of the Judicial Code as amended, *supra.*

Itow and Fushimi v. *United States*, 233 U. S. 581, 584.

Ansbro v. *United States*, 159 U. S. 695, 697.

But if plaintiff in error had raised below any question as to the constitutionality of the Act as amended, it is without substance. *Yee Hem* v. *United States*, 268 U. S. 178.

The plaintiff in error seeks to distinguish the *Yee Hem case* on the ground that it was decided before the amendment of May 26, 1922. But most of the objections to the Act now urged by the plaintiff in error were considered and disposed of by this Court in the *Yee Hem case*, and the principles established by that case are as applicable since the amendment of May 26, 1922, as they were before.

In the *Yee Hem case* this Court said (268 U. S. 178, 183):

> The authority of Congress to prohibit the importation of opium in any form and, as a measure reasonably calculated to aid in the enforcement of the prohibition, to make its concealment with knowledge of its unlawful importation a criminal offense, is not open to doubt. *Brolan* v. *United States*, 236 U. S. 216; *Steinfeldt* v. *United States*, 219 Fed. 879. * * *

The cases cited in the brief of the plaintiff in error, dealing with the Harrison Narcotic Act (Act of December 17, 1914, c. 1, 38 Stat. 785, as amended by the Act of February 24, 1919, c. 18, 40 Stat. 1057, 1130) have no bearing upon the constitutionality of

the Act of February 9, 1909, as amended. The latter Act is based on the commerce power.

Plaintiff in error further contends that the Act of February 9, 1909, as amended by the Act of May 26, 1922, is unconstitutional because the amendment created the Federal Narcotics Control Board and permitted the importation of "such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only." The argument is that this is a delegation of legislative power. This argument does not merit discussion. It has long been settled by this Court that while the legislature can not delegate its power to make a law, it may make a law which delegates to an administrative officer or body power to determine some fact or state of facts upon which the action of the law depends. *Field* v. *Clark*, 143 U. S. 649, 694; *United States* v. *Grimaud*, 220 U. S. 506; *McKinley* v. *United States*, 249 U. S. 397.

Nor is there any conflict between the Act of 1922, under which the case at bar arises, and the Act of January 17, 1914 (c. 10, 38 Stat. 277). The former Act deals with importing narcotic drugs, while the latter Act deals solely with the manufacture of smoking opium in this country. In no event could plaintiff in error, on the record before this Court, derive any advantage from possible conflict, for he is asserting no right under the Act of 1914. Moreover, if conflict existed, the later Act would prevail.

II

THE INDICTMENT FAIRLY MEETS THE CONSTITUTIONAL REQUIREMENTS

By his fourth assignment of error plaintiff in error alleges that the indictment does not inform him "of the nature or cause of the accusation," and therefore does not fulfill the requirements of the Constitution in this regard. His complaint appears to rest upon the claim that the indictment, which was one for conspiracy, should have descended into greater detail in describing the scope of the conspiracy and the overt acts committed thereunder.

It seems proper to set forth at this point the charging part of the indictment and a sample overt act (R. 2):

> The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present that Wong Tai, alias Wong Sue Jun, alias Wong Wai, hereinafter called the defendant, heretofore, to wit, on or about September 10, 1922, the exact date being to the Grand Jurors, aforesaid unknown, at the City and County of San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the Grand Jurors unknown, to commit the acts made crimes

and offenses by the laws of the United States, to wit, The Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, that is to say; the said defendant did, at the time and place aforesaid, knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the Grand Jurors, aforesaid, unknown, to unlawfully, wilfully, knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to wit, smoking opium, the said defendant well knowing the said drugs to have been imported into the United States and into the jurisdiction of this Court contrary to law.

That said conspiracy, combination, confederation and agreement between the said defendant and the said Ben Drew and the said divers other persons whose names are as aforesaid to the Grand Jurors unknown, was continuously throughout all the times from and after the month of September, 1922, and at all the times in this indictment mentioned and referred to and particularly at the time of the commission of each of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect

> and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to wit, three small sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors, aforesaid, unknown, which arrived on the Steamer *President Pierce* on or about February 24, 1923, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

In refusing a bill of particulars the trial court said (R. 9):

> Denied. The indictment seems sufficiently definite in view of unknown involved—and defendant moves for too much details of evidence.

From the very nature of the scheme employed by plaintiff in error, viz, to secure the secret bringing to this country of opium aboard vessels, its discharge in the night time through the port holes of said vessels into the water, and its subsequent recovery, landing, and distribution by him, obviously the Government could not possibly learn all the details regarding said opium and its handling. (R. 21 et seq.)

The indictment plainly sets forth all the statutory ingredients of the offense, so that the alleged lack of allegations of detailed facts therein can not be said to constitute such a fundamental defect as to require reversal.

This is a conspiracy indictment, and is plainly adequate under the rules of pleading applied to such indictments in *Thornton* v. *United States,* decided by this Court June 1, 1926, under No. 255 (not yet reported), and *Dealy* v. *United States,* 152 U. S. 539, 543 et seq.

Nor does the record disclose that the alleged defect in the indictment in anywise prejudiced the plaintiff in error in the preparation and submission of his defense. (R. 41 et seq.)

The following excerpt from *Lamar* v. *United States,* 241 U. S. 103, 116, wherein the sufficiency of the indictment was dealt with, equally applies to the record in the case at bar:

> * * * It is moreover to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, * * *.

In *Connors* v. *United States,* 158 U. S. 408, 411, this Court, in dealing with an attack upon the indictment, said, among other things:

> * * * There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he

was in doubt as to what was the precise offence with which he was charged.

The rule to be applied in cases involving attacks upon the sufficiency of the indictment, as in the case at bar, was concisely stated in *Armour Packing Co.* v. *United States,* 209 U. S. 56, 84, as follows:

> And in *Ledbetter* v. *United States,* 170 U. S. 606, 612, Mr. Justice Brown, speaking for the court, said:
>
> "Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense."
>
> In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.
>
> Had it been made by demurrer or motion and overruled it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in which the offense charged was committed. See Rev. Stat. U. S. § 1025; *Connors* v. *United States,* 158 U. S. 408, 411.

Whether a motion for a bill of particulars should be granted is to be determined in the exercise of a sound judicial discretion, which discretion is not reviewable except perhaps in a case exhibiting

manifest abuse. *Dunlop* v. *United States,* 165 U. S. 486, 491, and *Savage* v. *United States,* 270 Fed. 14, 18; certiorari denied, 257 U. S. 642.

An examination of the motion for a bill of particulars which appears at pages 7–9 of the record, indicates that the purpose of the motion was really to learn what evidence the Government possessed. Obviously, all the detailed facts sought by the motion were not necessary to enable plaintiff in error to understand the charge set forth in the indictment, and properly prepare his defense. Certainly it cannot be demonstrated that there was an abuse of discretion in the overruling of the motion.

From the foregoing the conclusion seems inevitable that (1) the record makes it plain that plaintiff in error fully understood the charge alleged against him in the indictment; (2) there is no defect of a fundamental character in the indictment; and (3) the constitutional question bedded on the alleged defect is lacking in substance.

III

NO QUESTION AS TO THE INSTRUCTION OF THE TRIAL COURT THAT "ANY MAN WHO FINDS SMOKING OPIUM IN THIS COUNTRY IS BOUND TO KNOW AND DOES KNOW THAT IT HAS BEEN UNLAWFULLY IMPORTED" IS OPEN IN THE RECORD NOW BEFORE THIS COURT, AND IN ANY EVENT THE INSTRUCTION WAS PROPER

The plaintiff in error complains of the following instruction given by the trial court (R. 52):

> The law forbids that kind of opium to come into the country at all. We know it is not made here in this country, so any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported; and then if he takes part in concealing it and transporting it, or receiving it and covering it up from the Government, then he is knowingly doing those things that the law forbids.

In his assignments of error plaintiff in error alleges that this instruction was not a correct statement of the law and that the provisions of the Act of February 9, 1909, as amended, in respect of the presumption arising from the unexplained possession of opium are unconstitutional and void. (R. 55.) The record fails to show that plaintiff in error raised any such question at the trial.

In addition, the instruction seems entirely proper. In the absence of any attempt on the part of plaintiff in error to show that he was lawfully in possession of opium, the instruction was in substance a statement of the presumption created by the statute. *Yee Hem* v. *United States,* 268 U. S. 178, specifically held that this presumption is valid.

CONCLUSION

The writ of error should be transferred to the Circuit Court of Appeals for the Ninth Circuit because no substantial constitutional question is involved, or, in the alternative, the judgment below should be affirmed. It is unfortunate that the de-

fects in jurisdiction were not noticed earlier, so as to prevent delay in the final disposition of this case.

Respectfully submitted.

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NOVEMBER, 1926.

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